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IN THE

Supreme Court of the United States

Court, U.S.
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October Term, 1971
No. 71-885

EDWIN O. WILLIS,

Appellant,

vs.

STATE BOARD OF CONTROL, State of California, and TRUSTEES OF CALIFORNIA STATE COLLEGES,

Appellees.

On Appeal From the Court of Appeal of the State of California, Fourth Appellate District, Division One

MOTION TO DISMISS OR AFFIRM

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SUBJECT INDEX

	Page
Motion to Dismiss or Affirm	1
Opening Statement	2
Argument	4
Conclusion	7
Appendix. Pertinent Text of Pages 51-54 of Respondent's Brief	App. p. A1

TABLE OF AUTHORITIES CITED

Cases

	Page
Connell v. Higginbotham, 403 U.S. 207 (1971)	4
Hines v. Davidowitz, 312 U.S. 52 (1941)	5
Hosack v. Smiley, 276 F. Supp. 876, aff'd per curiam 390 U.S. 744 (1968)	4
Hughes v. Superior Court of California, 339 U.S. 460 (1949)	7
Katzenbach v. Morgan, 384 U.S. 641 (1966)	6
Knight v. Board of Regents, 269 F. Supp. 339, aff'd per curiam 390 U.S. 36 (1968)	4
Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971)	4
McGowan v. Maryland, 366 U.S. 420 (1961)	5
Ohlson v. Phillips, 304 F. Supp. 1153, aff'd per curiam 397 U.S. 317 (1970)	4, 7
Purdy & Fitzpatrick v. State of California, 71 Cal. 2d 566 (1969)	5
Smith v. County Engineer, 266 Cal. App. 2d 645 (1968)	5
United States v. Pink, 315 U.S. 203 (1942)	5

Statutes

California Constitution, Art. XX, Sec. 3	2, 5
Government Code, Secs. 3100-08	5
Government Code, Sec. 3101	5
United States Code Annotated, Title 5, Sec. 16	4
United States Constitution, First Amendment	4, 6
United States Constitution, Fifth Amendment	4, 6
United States Constitution, Fourteenth Amendment	2, 5

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal from the judgment of the Court of Appeal of the State of California, Fourth Appellate District, be dismissed on the ground that it does not present a substantial federal question. Further, the decision below is so obviously correct that it warrants no further review. In the alternative, appellees move that the within appeal from the decision of the Court of Appeal be affirmed on the same grounds.

Opening Statement

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, upholds the validity of the first paragraph of the oath required by section 3 of Article XX of the California Constitution. Appellant refused to take the oath. He was denied employment as an associate professor of zoology at San Diego State College. He contends in his jurisdictional statement that the oath is so vague and overbroad as to impinge impermissibly upon the exercise of constitutionally protected rights; and also that the oath is invidiously discriminatory in violation of the Fourteenth Amendment of the Constitution of the United States because it is not required of state college faculty members who are aliens.

Section 3 of Article XX of the California Constitution, so far as pertinent here, provides as follows:

> "Members of the Legislature, and all public officers and employees, executive, legislative, and judicial, except such inferior officers and employees as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation:
>
> 'I, . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this

obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.' "

The decision of the Court of Appeal was so clearly correct that further consideration of appellant's contentions are not necessary.

A copy of the unpublished decision of the Court of Appeal is attached as an appendix to Appellant's Jurisdictional Statement. Since the decision refers with approval to pages 51-54 of the respondents' brief filed by appellees in the Court of Appeal, appellees have attached the text of said pages of their respondents' brief as an appendix to this motion to dismiss or affirm.

ARGUMENT

1. Recent decisions by this Court and by lower federal district courts have uniformly upheld the validity of similar state oaths, requiring a pledge of constitutional support as a condition to state employment against similar charges of unconstitutionality because of alleged abridgment of First and Fifth Amendment rights. *Knight v. Board of Regents*, 269 F. Supp. 339, aff'd per curiam 390 U.S. 36 (1968); *Hosack v. Smiley*, 276 F. Supp. 876, aff'd per curiam 390 U.S. 744 (1968); *Ohlson v. Phillips*, 304 F. Supp. 1152, aff'd per curiam 397 U.S. 317 (1970); *Connell v. Higginbotham*, 403 U.S. 207 (1971); *See* also *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 163-164 (1971).

Although, as the Court of Appeal recognized, the California oath is longer, it requires no more of the subscriber than the oaths of the other states considered in these decisions. Its meaning is not vague and it is not overbroad. As the Court of Appeal correctly stated:

> "It asks no more than simple recognition of our system of constitutional law, and demands no more of the California public employees than is required by Article VI, section 3 of the Constitution of the United States of all state and federal officers. (*See Connell v. Higginbotham, supra*, 91 S. Court 1772, 1773.)" (Juris. State, App. A4.)

An oath almost identical in form to California's oath is presently required of all officers and employees of the federal government (5 U.S.C.A. § 16) and has been required of such officers and employees since at least 1888 (*See* 23 U.S. Stats. 22).

The validity of the first paragraph of the oath set forth in section 3 of Article XX of the California Constitution has previously been upheld by the Court of Appeal of California in its decision in *Smith v. County Engineer*, 266 Cal. App. 2d 645 (1968).

2. The fact that the oath is not required of state college faculty members who are not citizens of the United States does not result in an arbitrary or capricious classification.[1]

There is a rational basis for this difference in treatment and hence it is not forbidden by the Fourteenth Amendment. *McGowan v. Maryland*, 366 U.S. 420, 426-27 (1961). It would be difficult, if not impossible, as a legal and practical matter, to require the oath of aliens who might otherwise be employed by public agencies. A state imposed requirement that nationals of foreign nations lawfully within this country, take an oath of allegiance to the United States and the State of California would be open to serious doubt on federal constitutional grounds as an invasion by the state of the sphere of immigration, naturalization and foreign relations reserved exclusively to the federal government. *See Purdy & Fitzpatrick v. State of California*, 71 Cal. 2d 566 (1969); *United States v. Pink*, 315 U.S. 203 (1942); *Hines v. Davidowitz*, 312 U.S. 52 (1941). Moreover, the practical effect of requiring the oath of aliens would be to prohibit the employment of

[1]The exemption of aliens is created by statute. The Levering Act (Gov. Code §§ 3100-08) requires all civil defense workers to take the oath of allegiance set forth in section 3 of Article XX of the California Constitution; and for the purpose of that Act all public employees are civil defense workers, excluding aliens legally employed (Gov. Code § 3101). The appellees' answer to the First Amended Complaint herein admitted the oath is not required of members of the faculty of the California State Colleges who are aliens.

aliens who otherwise might be qualified to work for the state, or a county or city. An alien could not reasonably be expected to take an oath of allegiance to a country or state foreign to his own country of citizenship.

Appellant argues that classification on the basis of alienage is a "suspect classification" which invokes application of the close scrutiny standard of equal protection and that the standard is not met here because no compelling state interest is served by excluding aliens from the oath taking requirement. But aliens do not suffer any harm or injury as a result of exclusion from the oath taking requirement. Indeed, assuming *arguendo*, the oath imposes some burden on the First or Fifth Amendment rights of those required to take it, aliens benefit by the exclusion. We are aware of no authority, and appellant has cited none, which would support the proposition that a classification on the basis of alienage which does not discriminate *against* aliens is a "suspect classification" requiring application of the close scrutiny doctrine. On the other hand *Katzenbach v. Morgan*, 384 U.S. 641 (1966), supports the conclusion that the rational basis test is alone applicable to a benign classification on the basis of country of origin. Furthermore, obviously the very factors discussed above in support of the rationality of not requiring the oath of aliens also constitute legitimate and compelling reasons for excluding aliens from the oath taking requirement. Therefore, the exclusion is constitutional under either the rational basis or close scrutiny standards.

In any event, even assuming *arguendo* said factors do not constitute a rational basis or legitimate and compelling reasons for not requiring the oath of

aliens, the oath is nonetheless constitutional. There is no constitutional requirement that a regulation must reach every class to which it might be applied. There is no requirement that it be applied to other groups to which its application would be equally reasonable. *Hughes v. Superior Court of California*, 339 U.S. 460 (1949); *Ohlson v. Phillips, supra*, 304 F. Supp. 1152, 1155, aff'd per curiam 397 U.S. 317.

Conclusion.

Appellees' motion to dismiss or affirm should be granted.

Respectfully submitted,

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APPENDIX.

Accord, Ohlson v. Phillips, supra, 304 F. Supp. 1152, 1155.

E. *The Fact That Alien Members of the Faculty of the California State Colleges Are Not Required to Take the Oath Does Not Result in an Arbitrary and Unreasonable Classfication.*

On Page 27 of his brief, appellant states that, "the oath establishes an arbitrary and unreasonable classification;" and on page 18, appellant states that California's oath "is expressly limited to state employees who are citizens." To the extent that appellant thereby implies that section 3 of Article XX contains an *express* exemption for aliens, plaintiff errs. The exemption is created by statute. The Levering Act (Gov. Code §§ 3100-08) requires all civil defense workers to take the oath of allegiance set forth in section 3 of Article XX; and for the purpose of that Act, all public employees are civil defense workers, excluding aliens legally employed. (Gov. Code § 3101.)

Labor Code section 1941 generally prohibits the employment of aliens by the state, counties and cities. Labor Code section 1944 lists several exceptions to this prohibition, including any member of the faculty or teaching force of any college or university supported in whole or in part by the state.

The exemption in the Levering Act for aliens legally employed and the exceptions in Labor Code section 1944 to the prohibition against employment of aliens antedate the 1952 amendment to section 3 of Article XX of the California Constitution. Such evidence of intent as may be gleaned from a reading of the amendment and the ballot arguments disclose no purpose to im-

pose a blanket prohibition on alien employment by public agencies. Repeals by implication are not favored, and will occur only in cases of irreconcilable conflict; that is, when the inconsistency is such that concurrent operation of the two enactments is not possible. (*Railroad Commission v. Riley,* 192 Cal. 54 (1923); *Smith v. Mathews,* 155 Cal. 752 (1909).) The legislative intent behind a new law is of importance and may establish or deny a repeal by implication. (2 Sutherland, *Statutes and Statutory Construction* (3d ed. 1943), § 2102, pp. 5-10.) The constitutional amendment deals with one subject and Labor Code section 1944 with another. The collision, if any, between the constitutional amendment and Labor Code section 1944 would be entirely fortuitous.

It would be difficult, if not impossible, as a legal and practical matter, to require the oath of aliens who may otherwise be employed by public agencies. A state-imposed requirement that nationals of foreign nations, lawfully within this country, take an oath of allegiance to the United States and the State of California would be open to serious doubt on federal constitutional grounds as an invasion by the state of the sphere of immigration, naturalization and foreign relations reserved exclusively to the federal government. *See Purdy & Fitzpatrick v. State of California,* 71 A.C. 587 (1969);[20] *United States v. Pink,* 315 U.S. 203 (1942); *Hines v. Davidowitz,* 312 U.S. 52 (1941). Moreover, the practical effect of requiring the oath of

[20]In its 1970 session, the Legislature enacted Assembly Bill 1057 (Stats. 1970 ch. 653), to repeal Article 2 (commencing with section 1940) of chapter 2 of Part 7 of Division 2 of the Labor Code. Subject to the referendum provisions of the California Constitution, said act will become effective in November of 1970.

aliens would be to prohibit the employment of aliens who otherwise might be qualified to work for the state, a county, or a city under Labor Code section 1944. This is so because an alien could not reasonably be expected to take an oath of allegiance to a country or state foreign to his own country of citizenship. This practical limitation, as well as the constitutional limitations on the authority of the state to regulate with respect to such a matter, affords a reasonable basis for treating aliens differently from citizens insofar as the oath requirement is concerned. The Fourteenth Amendment does not forbid classification or discrimination; it prohibits only arbitrary and capricious action. The test is not whether a statute discriminates or classifies, but whether a statutory discrimination has a rational basis. A statute is presumed to be valid, and a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland;* 366 U.S. 420, 426-27 (1961).

Furthermore, even assuming, *arguendo*, that there were no practical or constitutional inhibitions against application of the oath to aliens, there is no constitutional requirement that a regulation must reach every class to which it might be applied. *Hughes v. Superior Court of California,* 339 U.S. 460, 94 L. Ed. 985 (1949); *Ohlson v. Phillips, supra,* 304 F. Supp. 1152, 1155, 90 S. Ct. 1124, affirmed per curiam. There is no requirement that it be applied to all other groups to which its application would be equally reasonable.